RECORD AND BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES W. ZIGLAR,
Petitioner,
v.
AHMER IQBAL ABBASI, *et al.*,
Respondents.

JOHN D. ASHCROFT, former U.S. Attorney General, and ROBERT MUELLER, former Director of the FBI,
Petitioners,
v.
AHMER IQBAL ABBASI, *et al.*,
Respondents.

DENNIS HASTY and JAMES SHERMAN,
Petitioners,
v.
AHMER IQBAL ABBASI, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* FORMER CORRECTIONAL OFFICIALS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici curiae are former correctional directors and administrators with extensive on-the-ground experience supervising prisons and jails throughout the United States.[1] *Amici* respectfully submit this brief in support of Respondents Ahmer Iqbal Abbasi, *et al.*

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[1] No counsel for any party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. Communications reflecting consent from the parties have been filed with the Clerk's office along with this brief.

Martin F. Horn served as the Secretary of Corrections of Pennsylvania from 1995 until 2000. He was also the Commissioner of the New York City Department of Correction and of the New York City Department of Probation for seven years. He is currently the Distinguished Lecturer in Corrections at the John Jay College of Criminal Justice and the Executive Director of the New York State Sentencing Commission.

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Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system. He has worked as a correctional officer, including on death row, as a probation and parole officer, and as a prosecutor. He has testified before the U.S. Congress and many other oversight bodies, and has extensive experience in the development of correctional standards, policies, procedures, and guidelines across the United States. As a correctional expert for the U.S. Department of Justice (the "DOJ") and as a consultant in over forty states, he has visited or inspected more than 700 confinement facilities.

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Eldon Vail served as Secretary of the Washington State Department of Corrections from 2007 to 2011. He has over thirty years' experience in the field of corrections. He previously was Warden at three adult institutions, including facilities that housed maximum, medium, and minimum-security inmates. He has also served as an expert witness and correctional consultant on security issues and conditions of confinement in prisons and jails across the country.

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SUMMARY OF ARGUMENT

Amici are deeply concerned by the claims advanced by the Petitioners Dennis Hasty and James Sherman, former Metropolitan Detention Center (the "MDC") wardens (the "MDC Petitioners"). In particular, the MDC Petitioners claim that they are immunized from liability for subjecting detainees to abusive conditions of confinement on the basis of race, religion, or national origin because they acted on orders from law-enforcement officials. That position contradicts the relevant regulations and our experience and practices as correctional officials. As one former federal Bureau of Prisons (the "BOP") director wrote, "Society should expect that prisons will protect public safety" and "that inmates will be confined safely and humanely." J. Michael Quinlan, *What Should the Public Expect from Prisons—Overcoming the Myths*, Federal Prisons Journal 1 (Summer 1990), at 6. It is this expectation that we urge the Court to vindicate.

Amici write to highlight three important reasons the MDC Petitioners should be held accountable for the alleged mistreatment of Respondent detainees. First, wardens have sweeping and binding authority over correctional institutions. It is therefore more than plausible that they approved, or were aware of and failed to discontinue, official and unofficial policies and practices involving highly restrictive confinement, impermissible strip searches, and the physical and verbal mistreatment of detainees by correctional officers.

Second, BOP regulations and policies proscribe segregating and restrictively confining detainees on non-individualized grounds and on the basis of race, religion, or national origin. These regulations and policies also prohibit any physical or verbal abuse of

detainees. Respondents more than plausibly allege that the MDC Petitioners either directly violated these proscriptions or knew of the alleged violations and failed to prevent them. Moreover, reports from the DOJ Office of the Inspector General (the "OIG") are consistent with Respondents' allegations regarding treatment of detainees that violated BOP regulations and policies.

Finally, the MDC Petitioners' argument that they are immune from liability because they followed "orders" from the FBI and the BOP fails for several reasons. First, the argument that the FBI's terrorism designations constituted orders mischaracterizes as hierarchical what is, in fact, a co-equal relationship between DOJ agency components—the FBI and the BOP. Second, compliance with the BOP's "highly restrictive conditions" policy for detainees apprehended in the FBI's post-9/11 investigation did not actually require that the MDC Petitioners disregard well-established and binding BOP policies requiring individual assessments for detainees placed in restrictive confinement and prohibiting such confinement based on racial, religious, or ethnic grounds. Third, the MDC Petitioners ignore that neither the FBI nor the BOP even arguably ordered much of the mistreatment alleged in the Fourth Amended Complaint. Finally, wardens are not obligated to follow orders that violate established prison policies and that serve no legitimate penological objective. Indeed, affording inmates and detainees their established procedural and constitutional protections does not undermine the criminal-justice system's chain of command; to the contrary, it ensures both the proper functioning of prisons and inmate and detainee safety.

ARGUMENT

I. THE ABUSES DOCUMENTED IN THE OIG REPORT AND COMPLAINT COULD ONLY HAVE OCCURRED WITH THE MDC PETITIONERS' COMPLICITY

The OIG's reports on conditions at the MDC[2] and Respondents' Fourth Amended Complaint recount a series of abuses and conditions of confinement that could not have occurred but for the MDC Petitioners' direct involvement in, or their awareness of and failure to prevent, the unlawful conduct. Correctional literature, best practices, and psychological studies draw a direct line between institutional supervisors' actions or inaction and inmate or detainee abuse, particularly when discrimination animates the abuse.

A. Wardens Are Uniquely Positioned Not Only to Direct, but Also to Prevent, Unlawful Conditions of Confinement and Mistreatment of Detainees

Wardens and correctional supervisors play vital roles within a correctional facility. Decades of correctional literature make patently clear that a warden

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[2] Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Apr. 2003) (the "OIG Report"); Office of the Inspector General, U.S. Dep't of Justice, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* (Dec. 2003) (the "Supplemental OIG Report"). The OIG Report is available at https://oig.justice.gov/special/0306/full.pdf, most of which is found at J.A. 34–335. The Supplemental OIG Report is available at https://oig.justice.gov/special/0312/final.pdf, and can be found at J.A. 336–416.

has ultimate responsibility for what happens in a correctional institution. Clemens Bartollas & Stuart J. Miller, Correctional Administration 112, 116 (1978); Nancy M. Campbell, Nat'l Inst. of Corrections, Correctional Leadership Competencies for the 21st Century: Manager and Supervisor Levels 10–14 (2006). Correctional supervisors are responsible for the work of officers whom they command, Bartollas & Miller, *supra*, at 178, and they shape the culture of the institution. Campbell, *supra*, at 27 ("Managers and supervisors determine the legitimacy of governmental institutions as the frontline agents of leadership and management.").

This literature, which is consistent with the experience of *amici*, also makes clear that the decisions of a warden drive both the successes and failures of an institution. *See* John DiIulio, Jr., No Escape: The Future of American Corrections 12 (1991) ("Poor prison and jail conditions are produced by poor prison and jail management; cruel and unusual conditions are the product of failed management."); Campbell, *supra*, at 35 ("Supervisors carry the ethical culture of the organization. If they fail, the organization fails."); Stan Stojkovic & Mary Ann Farkas, Correctional Leadership: A Cultural Perspective 99 (2003) ("The moral sense of a prison is determined by the efforts of correctional leaders."). A correctional supervisor's actions and judgments create concrete and serious consequences for the frontline staff and detainees. *See* Campbell, *supra*, at 26–27; *id.* at 32 ("Every action sets a precedent, shapes expectations, and influences how others will behave in the future.").

Well-run prisons require wardens who "make frequent on-site institutional tours." John J. DiIulio, Jr., Governing Prisons: A Comparative Study of

Correctional Management 241 (1990 ed.). Successful prison leaders "are highly 'hands-on' and pro-active. They pay close attention to details and do not wait for problems to arise but attempt to anticipate them." *Id.* at 242; *see also* Kevin N. Wright, Effective Prison Leadership 17 (1994) ("Pursuit of quality in prison administration requires dogged attention to detail."); Stojkovic & Farkas, *supra*, at 107–08 (stressing importance of "correctional presence by management and leadership").

Correctional supervisors are also responsible for protecting detainees from discrimination. Correctional leadership is especially critical when "[r]acial, cultural, [and] religious . . . differences compound the power inequality and vulnerability of both offenders and correctional personnel." Campbell, *supra*, at 27. These immutable differences can create a "tinderbox" in detention centers that easily ignites in "anger, misunderstanding, or violence." *Id.* at 35. But it is the affirmative duty of correctional supervisors to ensure that the safety and rights of detainees are respected "even under difficult circumstances." *Id.* at 26.

Laws, regulations, policies, and supervisor oversight enable a prison to maintain security while at the same time protecting detainees from correctional-officer abuses. These protections are most vital in times of high anxiety when racial and religious prejudices can take violent form. Correctional supervisors have the power—and the responsibility—both to be aware of and to prevent these potential conflicts in prisons. *Id.* And, to be sure, there is an obligation for prison administrators not to incite discriminatory and abusive treatment themselves.

B. The Absence of Effective Correctional Leadership Leads to Abuses

Prison leaders' actions regarding (or indifference to) humane treatment of detainees can lead directly to correctional officers' abuse of detainees. One needs to look no further than Philip Zimbardo's seminal study of prison society—the Stanford Prison Experiment—to appreciate this dynamic.

Zimbardo constructed a simulated prison and selected twenty-one volunteers to participate as either "guards" or "prisoners" in a two-week experiment. Philip Zimbardo et al., *Interpersonal Dynamics in a Simulated Prison*, 1 Int'l. J. Criminology & Penology 69, 73 (1973) ("*Interpersonal Dynamics*"). Guards, working in eight-hour shifts and without supervision or policy guidance, were responsible for maintaining prison routines—such as meals, a prescribed work regimen, and recreation time—and for preserving prison security through disciplinary measures when necessary. In a matter of days, the prison became a zone of intense hostility, harassment, and outright aggression. *See id.* at 80–81, 89. In the absence of rules, regulations, or supervisor intervention, a cruel and capricious power dynamic developed, and the guards committed abuses. For example, guards regularly cursed and insulted prisoners, unnecessarily handcuffed and blindfolded them, forced some into a two-by-two closet for solitary confinement, force-fed those who refused to eat, and made them do demeaning tasks, including cleaning the cell-block's toilets with their bare hands. Philip Zimbardo et al., *A Pirandellian Prison: The Mind is a Formidable Jailer*, N.Y. Times Mag., Apr. 8, 1973, at 38. The exercise of arbitrary power over every aspect of the prisoners' daily existence drove some of the prisoners into fits of crying, rage, depression, and

anxiety so acute that five of them had to be excused from the study. *Id.*; *Interpersonal Dynamics*, *supra*, at 81. Zimbardo later declared that the same forces that contributed to the abuses observed in the experiment—including "no supervision . . . and no accountability"—may have contributed to the abuses perpetrated against detainees by U.S. military guards at the Abu Ghraib prison in Iraq. Melissa Dittmann, *What Makes Good People Do Bad Things?*, Am. Psych. Assoc. (Oct. 2004), *available at* http://www.apa.org /monitor/oct04 /goodbad.aspx.

The results of Zimbardo's experiment are consistent with the experience of *amici* and correctional literature. For example, addressing the abuse at Abu Ghraib, Major General Antonio M. Taguba noted that "many of the problems inherent in the 800th MP Brigade were caused or exacerbated by poor leadership and the refusal of [the] command to both establish and enforce basic standards and principles . . . ." Seymour M. Hersh, *Torture at Abu Ghraib,* New Yorker (May 10, 2004). Correctional officers need to know that their leaders support compliance with proper policies and practices, and correctional leaders must in turn manifest those beliefs through their words and actions. Stojkovic & Farkas, *supra*, at 112.

C. Wardens' Actions That Encourage Discrimination Are Especially Likely to Produce Abuses by Frontline Correctional Officers

Wardens' discriminatory directives and epithets leveled at prisoners can cause frontline officers to dehumanize and mistreat prisoners. In a Harvard University experiment conducted several years after the Stanford experiment, students were told to deliver electric shocks—at intensities of their choosing—to a

member of another group for providing inadequate solutions to problems. Albert Bandura et al., *Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. Res. in Personality, 253–69 (1975), https://web.stanford.edu/dept/psychology/bandura/pajares/Bandura1975.pdf [https://perm a.cc/LV47-PTSM]. One group of student-punishers was allowed to overhear one of the "test" administrators describe the members who were to be shocked as "animals" before the test began; another group was allowed to overhear the administrator describe the group as "nice." The punishers were more likely to deliver what they thought were increased levels of electrical shock to members they had heard described as "animals." *Id.* at 266 ("Dehumanized performers were treated more than twice as punitively as those invested with human qualities . . . ."). In fact, "subjects gradually increased their punitiveness toward dehumanized and neutral performers even in the face of evidence that weak shocks effectively improved performance and thus provided no justification for escalating aggression." *Id.*

The "Blue Eyes/Brown Eyes Exercise" further illustrates the effects of an authority's treating class members as an "out-group." *See generally* William Peters, A Class Divided: Then and Now (expanded ed. 1987). In that exercise, classroom participants were segregated into two groups based on eye color. The authority figure treated participants with blue eyes as part of the "out-group" in various ways. Through the course of the day, members of the "out-group" were considered inferior, teased by other participants, and verbally abused based on nothing more than their eye color. *Id.* at 22–26. The same exercise produced comparable results when conducted with correctional

staff in the Iowa Department of Corrections. *Id.* at 141–62.

The combination of labeling detainees as part of an "out-group," dehumanizing them, and allowing correctional officers to exercise broad discretion with limited supervision can lead directly to detainee abuse by officers. This combination was especially potent as animosity toward Muslims and Arabs soared immediately after the September 11 terrorist attacks. *See* Kuang Keng Kuek Ser, *Data: Hate Crimes Against Muslims Increased After 9/11*, PRI (September 12, 2016, 2:45 PM) (noting increase in anti-Muslim hate crimes in 2002, from 28 to 481 incidents).

This is precisely the dynamic that took hold at the MDC. Respondents allege that the MDC Petitioners are responsible for the abuses perpetrated against them—not because the MDC Petitioners were supervisors, but because the MDC Petitioners detained Respondents on the basis of race, religion, or national origin and directed, or knew of and failed to prevent, abusive conditions in the institution. *See* Compl. ¶¶ 68–77, 111–18 (alleging Hasty and Sherman approved documentation falsely representing that MDC staff individually assessed detainees prior to confining them in the Administrative Maximum Special Housing Unit (the "ADMAX SHU")—the harshest conditions in the federal prison system—despite knowing they had no ties to terrorism; approved and implemented strip search policy to intimidate and punish detainees; and called detainees "terrorists"); J.A. 231–40, 282–91 (OIG Rep. 118–26, 152–57) (documenting ADMAX SHU conditions); J.A. 72 (OIG Rep. 19) (noting "the BOP did not really know whom [sic] the detainees were"); J.A. 395 (Supp. OIG Rep. 35) (concluding strip searches were "inappropriate").

II. FEDERAL PRISONS OPERATE ACCORDING TO CLEAR LINES OF AUTHORITY AND REQUIRE NON-DISCRIMINATORY DETENTION PRACTICES

Federal regulations and policies governing the management of BOP facilities require the warden to be intimately involved in the administration of the facility.[3] In particular, a warden is required to play a critical role in both the decision to place a detainee in restrictive confinement[4] and the decision to continue to keep a detainee in restrictive confinement. A warden must implement and follow strict procedures to ensure that detainees are placed in restrictive confinement only under limited and clearly defined circumstances. The regulations are clear that detainees may not be confined on a discriminatory or non-individualized basis.

The conduct alleged in Respondents' Fourth Amended Complaint demonstrates that the MDC Petitioners did not remotely follow the applicable regulations as to conditions of confinement. Specifically, Respondents allege that the MDC Petitioners ordered their placement in the ADMAX SHU without individualized assessments of their dangerousness or risk and owing only to the fact that they were perceived as Muslim or Arab. Respondents also allege that the MDC Petitioners chose to disregard readily available information demonstrating the absence of any ties between

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[3] *Amici* discuss relevant BOP regulations and policies that were in effect at the time of the allegations set forth in the Fourth Amended Complaint.

[4] The term "restrictive confinement" is used herein to describe conditions of confinement that are sometimes referred to as restrictive confinement, solitary confinement, administrative detention, or disciplinary segregation.

Respondents and terrorism and instead confined Respondents in the ADMAX SHU for extended periods of time without regard for due process. If the MDC Petitioners had followed BOP regulations and policies, it is highly unlikely that any of this could have occurred.

A. Federal Regulations Require Wardens to Play a Critical Role in Placing Detainees in Restrictive Confinement and Strictly Define the Circumstances Under Which Restrictive Confinement Is Permissible

1. BOP Regulations Require Wardens' Involvement in the Placement of Detainees in Restrictive Housing

BOP regulations and policies require the warden's involvement before a detainee can be placed in restrictive confinement. One form of restrictive confinement is termed "administrative detention," defined as "the status of confinement of an inmate in a special housing unit in a cell either by self or with other inmates which serves to remove the inmate from the general population." 28 C.F.R. § 541.22 (2001).[5] Under 28 C.F.R. § 541.22(a) (2001), the warden may place an inmate in administrative detention when the inmate's

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[5] Immigration detainees are entitled to due-process protection against punishment—greater protection than that afforded to convicted prisoners under the Eighth Amendment, *see Bell v. Wolfish*, 441 U.S. 520, 537 n. 16 (1979); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)—but even policies applicable to post-conviction prisoners forbid the type of treatment alleged in the Fourth Amended Complaint. Because post-conviction regulations are relevant as a minimum floor for all inmates, *amici* discuss regulations that apply to both pre-trial detainees and convicted prisoners.

continued presence in the general population "poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution." A warden who places an inmate in administrative detention on any such basis must prepare an order "detailing the reasons for placing [the] inmate in administrative detention" and must furnish a copy of that order to the inmate within twenty-four hours unless doing so compromises institutional security. 28 C.F.R. § 541.22(b) (2001). And even when permissible, administrative detention may occur "only for short periods of time except where [the detainee requires] long-term protection . . . or where there are exceptional circumstances, ordinarily tied to security or complex investigative concerns." 28 C.F.R. § 541.22(c) (2001). Furthermore, detention must end "when reasons for placement cease to exist." *Id.*

Another form of restrictive confinement is termed "disciplinary segregation." Disciplinary segregation is primarily a punitive measure imposed "when other available dispositions are inadequate to achieve the purpose of punishment and deterrence necessary to regulate an inmate's behavior within acceptable limits." 28 C.F.R. § 541.20(a) (2001).[6] Under federal regulations, a warden may place an inmate in disciplinary segregation only following a hearing in which a

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[6] A warden may also temporarily place an inmate in a more secure cell (which may be an area normally reserved for disciplinary segregation) for up to five days where the inmate causes a serious disruption (threatening life, serious bodily harm, or property) and where the inmate cannot be controlled through administrative detention; or upon the advice of medical staff. 28 C.F.R. § 541.20(b) (2001).

Disciplinary Hearing Officer determines that the inmate has committed certain prohibited acts. *Id.* In such instances, the warden must provide the inmate with advance written notice of the charge(s) against the inmate no fewer than twenty-four hours before the hearing. 28 C.F.R. § 541.17(a) (2001). The period of disciplinary segregation may not exceed sixty days for a single offense. 28 C.F.R. § 541.13 Table 6 (2001).

A warden must also designate a staff member to serve as a Segregation Review Official (the "SRO") to conduct regular reviews of inmates in restrictive confinement. 28 C.F.R. § 541.16(d) (2001). In addition to mandating that the SRO review an inmate's status within seven days of his placement in restrictive confinement, the applicable regulations require the SRO to conduct weekly reviews and hearings every thirty days to assess the inmate's case. 28 C.F.R. §§ 541.20(c), 541.22(c) (2001). *See also* Virginia Hutchinson et al., Nat'l Inst. of Corrections, Inmate Behavior Management: The Key to a Safe and Secure Jail 5 (2009) (noting that "[j]ail policies and procedures must ensure that every inmate is formally reassessed in response to new information and at regularly scheduled intervals").

2. BOP Regulations and Policies Prohibit Segregation of Detainees on Non-Individualized Grounds and Discriminatory Bases

Given that BOP regulations require officials to make an individualized determination before subjecting an inmate to restrictive confinement, wardens may not single out inmates for harsher conditions of confinement except in limited circumstances. *See* 28 C.F.R. §§ 541.20(a), 541.20(b), 541.22(a), 541.22(b)

(2001) (defining disciplinary segregation and administrative detention, respectively, and delineating procedures for placement therein). Moreover, BOP regulations unequivocally prohibit restrictive confinement on racial, religious, and ethnic grounds. 28 C.F.R. § 551.90 (2001) ("[BOP] staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.").

B. The Complaint and the OIG Report Demonstrate that the MDC Petitioners Did Not Follow BOP Regulations and Policies

Given the conduct alleged in Respondents' Fourth Amended Complaint and the OIG's findings, the MDC Petitioners could not have acted in compliance with the governing regulations. The MDC Petitioners "ordered prolonged placement of [Respondents] and class members in the ADMAX SHU without following the processes they knew the law required for such deprivation." Compl. ¶ 68. By issuing these orders, the MDC Petitioners appear to have systematically ignored exculpatory evidence that supported ending the detainees' restrictive confinement. Instead, the MDC Petitioners denied Respondents the due process required for placement in restrictive confinement, in violation of their superintendent duties.

1. The MDC Petitioners Subjected Respondents to Restrictive Confinement Based on Discriminatory and Non-Individualized Determinations in Violation of BOP Regulations and Policies

The MDC Petitioners subjected Respondents to confinement in the ADMAX SHU through the implementation of discriminatory practices that violated the regulations and policies described above.[7] First, the MDC Petitioners ordered their subordinates to ignore the regulations that limit the circumstances under which detainees may be placed in restrictive confinement and that require weekly reviews and formal hearings every thirty days to assess a detainee's status. *Id.* As addressed in the OIG Report, "the BOP did not review the status of each September 11 detainee on a weekly basis and did not conduct formal hearings monthly to assess the detainee's status. Rather, it relied on the FBI's assessment of 'high interest.'" J.A. 230–31 (OIG Rep. 118). Second, the MDC Petitioners confined Respondents and class members to the ADMAX SHU for months beyond the timeframes authorized by federal regulations. Compl. ¶¶ 74, 76. Detainees placed in the ADMAX SHU were also automatically labeled "continue high security" in

[7] The OIG Report notes that "ADMAX units are not common in most BOP facilities because the conditions of confinement for disciplinary segregation or administrative detention in a normal [special housing unit] are usually sufficient for correcting inmate misbehavior and addressing security concerns." J.A. 231 (OIG Rep. 118–19). That the MDC Petitioners oversaw the creation of such a unit and ordered that Respondents and class members be confined there without any legitimate reason to believe that their circumstances even warranted placement in a normal special housing unit highlights their brazen disregard for proper prison procedure.

their monthly restrictive confinement reports, and they were denied any objective review of their placement. *Id.* at ¶ 68; *see also* J.A. 231 (OIG Rep. 118).

The MDC Petitioners must have been aware that placing Respondents in the ADMAX SHU without individualized determinations violated applicable regulations and policies. Certainly, the inference that they were aware is plausible, if not necessary. Thus, by approving documents stating falsely that Respondents were being held there based on "individualized assessment(s) of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration,'" the MDC Petitioners knowingly violated BOP regulations and policies. Compl. ¶ 74. As alleged, no such information was considered by the MDC Petitioners when deciding to place Respondents in the ADMAX SHU. To the contrary, the MDC Petitioners received—but apparently disregarded—frequent written updates demonstrating the absence of evidence linking Respondents to terrorism or indicating that they posed any danger. *Id.* at ¶ 70. Specifically, an MDC intelligence officer prepared and circulated these reports based on comprehensive FBI and INS detainee lists and databases reviewed for the very purpose of keeping the MDC Petitioners informed of any new intelligence on the detainees. *Id.* at ¶ 69.

The Fourth Amended Complaint also sets forth facts evincing violations of BOP regulations prohibiting discriminatory housing of inmates. The MDC Petitioners' disregard of exculpatory information and making of false claims that individual assessments were conducted render all the more plausible Respondents' allegations that they were detained in restrictive conditions on account of being, or being perceived as,

Muslim or Arab, *id.* at ¶¶ 60, 68–74, in violation of BOP regulations. 28 C.F.R. § 551.90 (2001).

There can be no dispute that "a restriction or condition [that] is not reasonably related to a legitimate goal" amounts to "punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish*, 441 U.S. at 539. The MDC Petitioners' characterization of all Respondents as "terrorists" without any individualized determinations and the accompanying abuse evinces no legitimate penological objectives; rather, the MDC Petitioners' actions reflect unacceptable discriminatory purposes.

This Court has also long recognized that racial discrimination is "especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). And the Court has repeatedly refused to relax its equal-protection standards in the prison context. *Johnson v. California*, 543 U.S. 499, 510–12 (2005) (holding California's prison inmate racial segregation policy subject to strict scrutiny) ("The right not to be discriminated against based on one's race . . . is not a right that need necessarily be compromised for the sake of proper prison administration."); *Lee v. Washington*, 390 U.S. 333 (1968) (affirming order requiring desegregation of Alabama prisons and jails). If the MDC Petitioners had followed BOP regulations and treated Respondents as "'regular' high-security inmates," J.A. 72 (OIG Rep. 19), then they would have conducted individualized assessments both before and during confinement in the ADMAX SHU. No FBI terrorism designation or BOP order excuses the lack of individual assessments or discriminatory confinement.

III. BOP FACILITIES OPERATE ACCORDING TO REGULATIONS THAT PROHIBIT ABUSIVE TREATMENT

Federal regulations and policies forbid the physical or verbal abuse of inmates and provide specific procedures under which a warden must address complaints by inmates concerning treatment. Respondents' Fourth Amended Complaint alleges, and the OIG found, that the MDC Petitioners were aware of and condoned abusive physical and verbal treatment of detainees, oversaw inappropriate strip searches, and deliberately ignored numerous complaints lodged by detainees concerning abusive conditions in the ADMAX SHU.

A. BOP Regulations and Policies Do Not Permit Abusive Treatment Under Any Circumstances

1. Use of Restraints and Force

BOP regulations and policies restrict the conditions under which prison personnel may use force or restraints (including, *inter alia*, handcuffs and four-point restraints) on inmates. Importantly, BOP regulations prohibit prison personnel from applying restraints to inmates confined to an administrative detention cell such as the ADMAX SHU without approval of the warden or his designee. 28 C.F.R. § 552.22(g) (2001). As to the use of force, prison personnel may resort to such methods "only as a last alternative after all other reasonable efforts to resolve a situation have failed." 28 C.F.R. § 552.20 (2001). Under such circumstances, "staff must use only that amount of force necessary to gain control of the inmate, to protect and ensure the safety of inmates, staff, and others, to prevent serious property damage and to ensure institution security

and good order." *Id.* Finally, any incident involving the use of force or the application of restraints must be carefully reported and such report must be placed in the inmate's central file. 28 C.F.R. §§ 552.22(j), 552.27 (2001).

2. Prohibitions Against Verbal Abuse

BOP policy strictly forbids verbal abuse against prisoners. *See* BOP Program Statement P.S. 3420.09 (9)(c)(4) (02/05/1999). Specifically, "[a]n employee may not use profane, obscene, or otherwise abusive language when communicating with inmates, fellow employees, or others. Employees shall conduct themselves in a manner which will not be demeaning to inmates, fellow employees, or others." *Id.*

3. Strip Searches of Inmates

Federal regulations clearly define the circumstances under which BOP personnel may conduct body searches of inmates. Among the types of searches that staff may conduct are visual—*i.e.*, strip—searches, which are defined as the "visual inspection of all body surfaces and body cavities." 28 C.F.R. § 552.11(b) (2001). BOP personnel may only conduct a strip search when they have a reasonable belief that an inmate may be concealing contraband, or where an inmate has had a good opportunity for such concealment. 28 C.F.R. § 552.11(b)(1) (2001).

Federal regulations also prescribe the manner in which strip searches are to be performed. Strip searches must be conducted so as to assure an inmate "as much privacy . . . as practicable." *Id.* Moreover, federal regulations require that strip searches be performed by personnel of the same sex as the inmate, "except where . . . delay would mean the likely loss of

contraband." 28 C.F.R. § 552.11(b)(2) (2001). Where staff of the opposite sex perform a strip search, the reasons for doing so must be recorded in the inmate's central file. *Id.*

4. Mandatory Review of Inmates' Complaints

Wardens at BOP facilities are responsible for ensuring that inmates' complaints are satisfactorily resolved. In particular, federal regulations provide that inmates are entitled to formal review of their complaints regarding conditions of confinement—including those concerning abusive treatment—through an administrative remedy program. *See* 28 C.F.R. § 542.10 (2001). Inmates have recourse to the program "if less formal procedures have not resolved the matter."[8] *Id.* Under these regulations, the warden must "[e]stablish procedures for receiving, recording, reviewing, investigating, and responding to Administrative Remedy Requests . . . or Appeals . . . submitted by an inmate," as well as acknowledge receipt of, investigate, and respond to all such requests or appeals. 28 C.F.R. § 542.11(a) (2001). Failure to fulfill these responsibilities is a violation of the warden's duties.

B. The Abusive Treatment at Issue Could Only Have Occurred with the MDC Petitioners' Knowledge and Failure to Take Measures to Prevent Such Treatment

The allegations in Respondents' Fourth Amended Complaint and the OIG's findings demonstrate that

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[8] Under 28 C.F.R. § 542.13 (2001), an inmate must first seek informal resolution of a complaint from prison staff before lodging a formal Request for Administrative Remedy. The warden is responsible for devising the process by which prison staff may informally resolve complaints.

the MDC Petitioners must have known that they were not in compliance with federal regulations governing the appropriate treatment of inmates because they ordered, approved, and implemented abusive and unlawful detention protocols and conditions that specifically targeted Muslim and Arab detainees. Compl. ¶¶ 60, 75. In addition, the MDC Petitioners ignored detainees' complaints of abuse in dereliction of their duty to properly implement an administrative remedy program. As a result of this failure to follow BOP regulations and policies, Respondents were subjected to unlawful treatment.

Contrary to federal regulations strictly limiting the use of force and restraints against detainees, MDC personnel stated in interviews that "it was appropriate to bend detainees' thumbs, gooseneck their wrists, or use pain compliance methods if the detainees were being noncompliant or combative, although many of them said the detainees never were noncompliant or combative." J.A. 366 (Supp. OIG Rep. 17). In another interview, an MDC official "incorrectly thought that security procedures required officers to step on detainees' leg restraint chains whenever they were stopped or whenever officers needed to remove their leg restraints." J.A. 372 (Supp. OIG Rep. 21). In addition, the Fourth Amended Complaint alleges various instances of the improper use of restraints on detainees, including using restraints "as a form of punishment by leaving [detainees] in a cell in restraints for no proper penological purpose." Compl. ¶ 105.

If the MDC Petitioners were doing their jobs consistent with the applicable regulations and policies, it is highly unlikely that such conduct could have

occurred. Indeed, disregard of BOP policies by correctional officers could only result from a failure on the part of the MDC Petitioners to properly train personnel in BOP policies, or from the MDC Petitioners' failure to enforce BOP policies. Or, even worse, the MDC Petitioners could have instructed personnel to engage in prohibited acts. For example, the OIG details an incident where an individual believed to be a senior MDC official was heard on a videotape stating, "We've got to leave them in restraints and make them behave." J.A. 378 (Supp. OIG Rep. 25).

After numerous complaints of abuse by detainees, the OIG, the BOP Office of Internal Affairs, and the FBI all opened investigations. The BOP also enacted a new policy in early October 2001 to video-tape the detainees whenever they were outside of their cells. Compl. ¶ 107; J.A. 344 (Supp. OIG Rep. 4). The fact that three different government entities found it necessary to launch investigations into allegations of mistreatment, as well as to ensure that any potential interactions between MDC personnel and the detainees in the ADMAX SHU were recorded, strongly corroborates the allegations that the MDC Petitioners failed to properly carry out their duties, as do the OIG's findings.

The MDC Petitioners also contributed to the verbal abuse of Respondents and failed to prevent such abuse after it was brought to their attention. For instance, the MDC Petitioners themselves referred to the detainees as "terrorists" in internal memoranda, and this term, as well as other derogatory names, were adopted by MDC personnel to disparage the detainees. *See* Compl. ¶ 147. As alleged in the Fourth Amended Complaint:

> MDC staff frequently interrupted [Respondents'] and class members' prayers by banging on cell doors, screaming derogatory anti-Muslim comments, videotaping, and telling them to "shut the fuck up" while they were trying to pray. Staff also mocked the detainees' prayer by attempting to repeat the Arabic phrases of the Azan (the call to prayer) loudly. One MDC guard frequently yelled "Jesus" whenever he heard the opening phrases of the Azan.

Id. at ¶ 136. As psychological studies have found and correctional experts have observed, wardens' actions and characterizations of inmates directly affect correctional officers' treatment of inmates. *See* Bandura et al., *supra*, at 266; Campbell, *supra*, at 26–27; *id.* at 32; Stojkovic & Farkas, *supra*, at 99.

Evidence and complaints of such verbal harassment were brought to the attention of the MDC Petitioners, and yet the verbal abuse persisted (perhaps because the MDC Petitioners themselves used such language). Compl. ¶¶ 110, 137. In fact, even without complaints, it is likely that the MDC Petitioners were aware of the derogatory terms directed at Respondents. The Fourth Amended Complaint alleges that the verbal harassment of the detainees "was so pervasive that one MDC employee estimated that half of the staff at MDC stopped speaking to him after he wrote a confidential memo to the Warden [Hasty] detailing detainees' complaints that was then distributed to the staff members on the ADMAX unit." *Id.* at ¶ 78. As in other instances, however the reported harassment went unpunished. *Id.*

In addition, the OIG found that the MDC Petitioners oversaw an unwritten strip-search policy that violated

the regulations governing such searches. J.A. 393 (Supp. OIG Rep. 34). The OIG found that strip searches were conducted far more frequently than authorized, including when detainees entered the ADMAX SHU, departed the ADMAX SHU, before medical examinations, and after attorney meetings, social visits, and recreation sessions. *Id.* These practices caused detainees to endure strip searches "for no apparent reason, either minutes after they had been thoroughly searched in [Receiving & Discharge ('R&D')] and immediately escorted by officers to the ADMAX SHU, or when they had not even left the ADMAX SHU." J.A. 392 (Supp. OIG Rep. 33). *See also* Compl. ¶¶ 112–13. Detainees were further subjected to strip searches before and after non-contact attorney visits during the course of which they were under constant monitoring, handcuffed, and shackled, and after being directly transferred from one cell to another. Compl. ¶ 112. These strip searches could not have been justified and were in violation of BOP regulations, as the detainees had no opportunity to obtain contraband under the circumstances. Nonetheless, some MDC officials stated that the conduct of these types of illegal strip searches was "standard MDC policy." J.A. 394 (Supp. OIG Rep. 34).

As a result of the BOP policy requiring that detainees be videotaped whenever they were outside of their cells, MDC staff, acting under the MDC Petitioners' instructions, filmed many strip searches in their entirety. J.A. 392 (Supp. OIG Rep. 33); Compl. ¶ 116. Such practices violated the regulations requiring that prison personnel perform strip searches "in a manner designed to assure as much privacy to the inmate as practicable." Compl. ¶ 116. There can be no dispute that the MDC Petitioners were aware of these practices because MDC staff maintained a "visual

search log" for MDC administration to review. *Id.* at ¶ 114. Consequently, the MDC Petitioners knew that detainees faced unlawful, invasive strip searches but failed to take remedial action.

It is highly unlikely that these arbitrary strip searches were the result of a few malfeasant MDC officers; rather, MDC personnel carried out the videotaped strip searches under orders from the MDC Petitioners. Given the allegations contained in the Fourth Amended Complaint, coupled with the OIG's findings, there can only be one logical conclusion: the MDC Petitioners either actively directed, or failed to prevent, the conduct alleged. Either way, the MDC Petitioners were grossly derelict in their duties.

IV. THE MDC PETITIONERS' ARGUMENT THAT THEY WERE PERMITTED TO VIOLATE APPLICABLE REGULATIONS AND POLICIES BASED ON FBI TERRORISM DESIGNATIONS AND BOP ORDERS IS BASELESS

The MDC Petitioners contend that they cannot be held liable for the alleged unlawful conditions of confinement because they were following FBI terrorism designations and BOP policy. Hasty & Sherman Br. 32–36, 40. BOP wardens, however, are under no obligation to follow assessments from a different agency component like the FBI that has no command authority over them. And to the extent that BOP Headquarters instructed MDC officials to restrictively confine detainees, wardens are not obligated to perform acts that violate the law or contradict longstanding BOP regulations and policies—such as imposing solitary confinement based on a blanket "designation," rather than conducting individualized determinations. Further-

more, detainees are entitled to certain minimum confinement conditions, which do not permit physical or verbal abuse, regardless of what "orders" might be given—not that it appears the MDC Petitioners claim they were following orders with respect to the abuse of detainees. Finally, as a matter of law, when wardens act outside the law and violate BOP regulations, claims that they were just "following orders" do not immunize them from liability for their wrongful conduct. *Forsyth v. Kleindienst*, 599 F.2d 1203, 1217 (3d Cir. 1979), cert. denied, *Mitchell v. Forsyth*, 453 U.S. 913 (1981).

A. Wardens Are Not Required to Follow FBI Designations Because—as BOP Employees—They Are Not Within the FBI's Chain of Command; Nor Are They Required to Follow BOP Instructions on Restrictive Confinement That Violate BOP Regulations and Policies

As officials within the BOP—a DOJ component separate from, but not subordinate to, the FBI—wardens are not required to follow FBI "orders" concerning confinement conditions. The BOP and the FBI are coequal "principal organizational units" within the DOJ. 28 C.F.R. § 0.1 (2001); OIG Rep. App. C (DOJ organizational chart).[9] The BOP director serves directly under the Attorney General, 18 U.S.C. § 4041 (2000), not the FBI director. In addition, the BOP, not the FBI, is charged with managing and regulating all federal penal and correctional institutions. 18 U.S.C. § 4042(a)(1) (2000); 28 C.F.R. § 0.95(a) (2001). And it is the BOP,

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[9] The OIG Report appendices are not included as part of the Joint Appendix, but are available at https://oig.justice.gov/special/0306/full.pdf.

not the FBI, that is tasked with housing, protecting, and caring for inmates, 18 U.S.C. § 4042(a)(2), (3) (2000), as well as the "[c]lassification, commitment, control, or treatment of persons committed to the custody of the Attorney General." 28 C.F.R. § 0.95(d) (2001).

Thus, the FBI had no authority to oversee—or command—MDC officials, including wardens Hasty and Sherman in any fashion. The FBI can do no more than provide "recommendations" to the BOP, which itself, in turn, issues directives to wardens. Relying on the FBI's terrorism designations, the BOP decided to "treat the September 11 detainees as high-security detainees," J.A. 72 (OIG Rep. 19), despite the fact that "BOP did not really know whom [sic] the detainees were." *Id.*

But even if the FBI or the BOP had the authority to instruct MDC officials to disregard applicable laws and regulations, no one actually directed the MDC Petitioners to treat Respondents differently than high-security detainees are typically treated. *See supra* II.B. The MDC Petitioners, therefore, were still required to comply with BOP regulations and policies and make individualized determinations concerning whether to implement restrictive confinement conditions, rather than confining detainees simply on the basis of their being, or being perceived as, Muslim or Arab.

B. The Harms Alleged by Respondents Were the Result of Direct Involvement by the MDC Petitioners, Which Exceeded Any "Orders" From the FBI and the BOP

The MDC Petitioners contend that they were merely following policies and orders issued by superiors,

Hasty & Sherman Br. at 32, but that misconstrues the facts alleged in the Fourth Amended Complaint. Respondents allege that the MDC Petitioners took an active role in designing and implementing abusive and unlawful detention conditions at the MDC, Compl. ¶ 75, and that the MDC Petitioners were deliberately indifferent to abuses perpetrated by frontline officers. *Id.* at ¶¶ 24, 26, 77–78.

Respondents allege several instances in which the MDC Petitioners went above and beyond any order in numerous ways, creating conditions of confinement that were unlawful, against BOP regulations and policies, and contrary to correctional "best practices," thus supporting the inference of punitive intent. *See Wolfish*, 441 U.S. at 539 n.20 (noting that while "loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution" such conditions would "support a conclusion that the purpose for which they were imposed was to punish").

First, the BOP did not order the MDC Petitioners to video- and audio-record detainee conversations with their attorneys. Nevertheless, when detainees finally secured legal representation, the MDC Petitioners instituted a policy of audiotaping those conversations and disregarded MDC staff's alternative "silent witness" camera proposals. Compl. ¶¶ 98–99.

Second, the BOP did not order the MDC Petitioners to strip-search the detainees in a manner contrary to law and BOP policy. But the MDC Petitioners nevertheless approved and implemented a strip-search policy that "inappropriately used strip searches to intimidate and punish detainees," J.A. 395(Supp. OIG Rep. 35), and violated BOP policy. J.A. 392–93 (Supp. OIG Rep. 33–34). *See supra* III.B.

Finally, the BOP did not order the MDC Petitioners to harass the detainees. But Petitioner Hasty called the detainees "terrorists" in various memoranda. Compl. ¶ 109. Such epithets, combined with Petitioner Hasty's deliberate failure to make rounds in the ADMAX SHU—contrary to BOP regulations and policies and correctional "best practices"—or otherwise supervise frontline officers, led directly to officers' verbal and psychological harassment of detainees. *Id.* at ¶¶ 109, 120–21, 136–37. *See supra* III.B.

As the Second Circuit found, the OIG Report supports Respondents' allegations concerning the design and implementation of the confinement conditions because, "while the decision to impose highly restrictive conditions was made at BOP headquarters . . . MDC officials created the particular conditions imposed." *Turkmen v. Hasty*, 789 F.3d 218, 247 (2d Cir. 2015) (citing OIG Rep. 19, 124–25). The order to hold the detainees in "the highest level of restrictive detention," *id.* at 248, does not justify the detention *conditions* that the MDC Petitioners designed and implemented.

C. Wardens Are Not Required to Follow Orders Requiring the Violation of BOP Regulations and Policies That Safeguard Detainees' Safety

Wardens may not escape liability simply because they complied with superiors' orders if those orders violate clearly established law and BOP regulations and policies. The MDC Petitioners contend that they should not liable for the confinement and treatment of detainees because they could not "disregard" FBI designations, and that such insubordination would upend the "proper functioning of law enforcement." Hasty & Sherman Br. at 32. But the Constitution,

BOP regulations and policies, and effective correctional practices give no quarter to the notion that obeisance to unlawful orders should immunize correctional officials from liability.

The "following-orders" defense plainly does not stretch to immunize the MDC Petitioners here. Simply put, a correctional officer's "[r]eliance on a superior's orders does not in itself dissipate all liability." *Thaddeus-X v. Blatter*, 175 F.3d 378, 393 (6th Cir. 1999) (en banc). As circuit courts have held in the law-enforcement and correctional context, "if [officials] knew or should have known that their actions were violating the plaintiffs' constitutional rights, then they will not be allowed to hide behind the cloak of institutional loyalty." *Forsyth*, 599 F.2d at 1217 (rejecting FBI agent's following orders argument). *See also Raysor v. Port Auth. of N.Y. & N.J.*, 768 F.2d 34, 38 (2d Cir. 1985) (citing Restatement (Second) of Agency § 343 comments b, d (1958)) (holding police officer who followed sergeant's orders could be found liable under 42 U.S.C. § 1983 for false arrest because of "the general tort rule that an agent is not relieved of liability merely because he acted at the command of the principal"). Where correctional officers have similarly contested their liability because they lacked authority to alter maximum-security classifications, lower courts have held that liability may be premised on the officers' failure to remedy a jail inmate's conditions of confinement that they knew to be punitive. *Villanueva v. George*, 659 F.2d 851, 854-55 (8th Cir. 1981) (en banc).

Other petitioners recognize that the purported chain of command is not inviolate. Petitioner James Ziglar "acknowledged that at some point he should have 'gone around the chain of command' directly to the Attorney General or the Deputy Attorney General" to

voice "INS's concerns about the ramifications caused by the slow pace of the detainee clearance process." J.A. 146–47 (OIG Rep. 67).[10]

The MDC Petitioners cannot escape liability based on their argument that they were just following orders. Respondents detail sufficient facts demonstrating that the MDC Petitioners were aware that the assignment of detainees to restrictive confinement was impermissibly based on the detainees' race, religion, or national origin, was carried out without any individual assessment, Compl. ¶¶ 68–74; *Lee*, 390 U.S. 333, and lacked legitimate penological purpose. Compl. ¶¶ 68–76; *Wolfish*, 441 U.S. at 539. Moreover, BOP regulations and policies proscribing such actions, *see supra* II.A, III.A, made them "fully aware of the wrongful character of their conduct." *See Hope v. Pelzer*, 536 U.S. 730, 744 (2002).

The "following-orders" defense is not justifiable as a matter of effective correctional management either. "Correctional managers and supervisors are tempted to deny responsibility because the jobs are hard, the decisions tough, and the consequences difficult. Moreover, managers and supervisors may receive harmful or questionable directives, yet feel an obligation to follow rules and orders." Campbell, *supra*, at 34. But blind allegiance to questionable orders "reduces the manager or supervisor to a machine with no discretion or judgment." *Id.* at 35. Contrary to the

[10] Reporting up the chain of command also rarely occurred. The OIG reported that the New York FBI and INS "failed to keep FBI and INS Headquarters informed of all aliens who would be subject to the clearance investigation requirement," attributing the lack of oversight to the New York offices' "long history of taking actions independent of direction from their Washington, D.C., headquarters." J.A. 124 (OIG Rep. 54).

MDC Petitioners' argument, it is, instead, immunization of correctional officials who follow unlawful orders and fail to remedy punitive conditions of confinement that would undermine the proper functioning of jails and prisons.

CONCLUSION

The Court should affirm the judgment of the court of appeals in favor of Respondents.

Respectfully submitted,

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